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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 1159.

C. C. CLARK, INC., PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Of Counsel.

INDEX

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above case, entered on January 23, 1947, reversing the judgment and decree of the District Court of the United States for the Northern District of Mississippi, entered on April 13, 1946.

OPINION BELOW.

The opinion of the court below is not yet reported; but is printed in the transcript of the record which accompanies this petition.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 347, Title 28, U. S. Code Annotated, same being Section 240(a) of the Judicial Code as amended.

QUESTION PRESENTED.

Is a taxpayer precluded from instituting and maintaining a suit for the recovery of an admitted overpayment of tax solely because of the fact that he had brought another suit, on another ground, under another section of the Code, under a different claim of right, and on "directly opposite facts"; and in which former suit the issue presented in the latter was not presented or adjudicated and could not have been presented or adjudicated?

SUMMARY STATEMENT OF THE FACTS.

All the essential facts are set out in the dissenting opinion of Judge Sibley in the case, beginning with the third paragraph thereof in which he states the exact pertinent facts. The facts are set out in his exact words and are these:

> "I will state the exact pertinent facts. This corporation, owned by six members of the Clark family, owed two of its stockholders notes for large sums, and in 1934 the directors made a resolution to pay $30,000 each year on them. In 1937 there were distributable profits of $118,500, and $30,000 thereof was set aside to be paid on the notes, and a dividend declared to the stockholders of the whole $118,500 of profits, represented by its notes. After the tax year and early in the next year the stockholders received in substitution cash amounting to $88,500 and surrendered the notes. The corporation's tax return showed as dividends

paid only the cash payment, and claimed no dividends paid credit for the $30,000 in notes given and surrendered, nor for the $30,000 paid on its note indebtedness. A refund of taxes was later asked solely because a credit was due under Section 26(c) on the ground that the $30,000 of profits paid on the notes could not be distributed because of a contract within that section. The refund was refused and suit brought on June 20, 1940, the sole issue made in the pleadings being that a refund was due on the ground just stated. The court on Oct. 17, 1940, held that the directors' resolution was not a contract which would excuse non-distribution of profits; and that alone was considered and adjudged in this court on appeal. *C. C. Clark, Inc., vs. United States*, 126 Fed. (2) 292. Meanwhile the stockholders, except C. C. Clark, in their returns reported as income only their proportion of the $88,500 cash dividend. C. C. Clark reported his proportion of $118,500. On Sept. 10, 1940, the contention was first made that a proportion of the $118,500 dividend in notes ought to be reported by them all, and on Dec. 6, 1940, additional taxes were assessed and were collected from the stockholders on Dec. 12, 1940. This was after the trial of the corporation's case in the district court. After the adverse decision by this court, but within the period for applying for refunds, the corporation, conceiving that if the entire $118,500 note dividend was a dividend paid so as to charge the stockholders, it was a credit of dividends paid for the corporation against its tax on undistributed profits under Section 27(a) and (d) of the Revenue Act of 1936, made another application for refund on these new facts and this different law. The Commissioner did not consider its merits but held he could not, because of the court judgment on the other claim. This suit followed."

REASONS FOR GRANTING THE PETITION.

1. The Circuit Court of Appeals for the Fifth Circuit erred in reversing the District Court's finding and holding that the issue presented is different from that adjudicated in the former action and that the matter is not *res judicata*.

2. The Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law on which "the Supreme Court has not spoken": a question which should be settled by this Court, in order to avoid its future recurrence and the resulting and irreparable injury to both taxpayers and the Government, and in order to avoid the confusion which must necessarily arise from numerous claims and suits with little or no merit, but which taxpayers in self-protection will be forced to file and which the courts will be put to the unnecessary time and trouble of deciding, merely because of the wholly erroneous and untenable majority decision of the court below.

3. The decision of the Fifth Circuit is in conflict with that of the Fourth Circuit in *Magruder* v. *Safe Deposit and Trust Company of Baltimore, etc.*, No. 5553, decided February 3, 1947, not yet reported but, for convenience of the Court, copied herein as an appendix to this petition. The Fifth Circuit followed, and based its opinion on, a decision of the Second Circuit, *Cleveland et al.* v. *Higgins,* 148 F. 2d 722 (April 10, 1945), which the Fourth Circuit pointedly refused to follow. Thus, there has arisen a direct conflict between circuit courts of appeals on the same matter and on an important question of federal law which has not been, but should be, settled by this Court.

4. "Equity, good conscience and fair play justify Judge (Cox's) view that *res judicata* should not serve as a bar to the present action"—Judge Dobie in the Magru-

der case. "It is more for the public good that the United States Government in its own courts should deal honorably with its taxpayers"—Judge Sibley's dissent in the instant case, wherein the reasons for granting this certiorari are set out clearly and succinctly. They are, in his own words and in his own italics, as follows:

> "It is probably true that the dividend in notes made during the tax year was the payment of a dividend for tax purposes, and not retractable during the next year, so that the additional tax on the stockholders successfully asserted by the Commissioner was according to law. It is just as true that a corresponding credit for dividends paid was owing to the corporation under Section 27(a) and (d). This was admitted in argument before us. The tax on the corporation so far as produced by the $30,000 under discussion was unlawfully collected, and ought under Internal Revenue Code Sect. 3770 to be refunded by the Commissioner. The authority to refund implies a duty. The language of Congress is broad and strong. He is 'authorized to remit, refund and pay back *all taxes* erroneously or illegally assessed or collected. . . . all taxes that appear to be unjustly assessed or *excessive* in *amount, or in any manner wrongfully collected.*' The application for refund here is timely, the excessive tax admittedly wrongfully assessed and collected, and Congress had put no strings on the Commissioner which interfere with his doing what is right.
>
> The courts in the cited cases have. They say that because the taxpayer sued once before about this excessive tax, and did not then present this question, different both in fact and law from that which the court decided, he is cut off—is fined in effect some $3,337. I think this is morally and legally wrong for two reasons: First, there was a mistake as to the effectiveness of the attempt to recall the note dividend, brought to light and corrected in favor of the United States after the former trial, and it ought to be corrected as to all parties. The United States ought not to be blow-

ing hot and cold as to whether this $30,000 was paid as a dividend in 1937. In such cases of inequity the strict rule of *res judicata* is not to be enforced in public litigation. *White vs. Adler*, 289 N. Y. 34, 43 N. E. (2) 798, and note thereto in 142 A.L.R. 905. Second, if the corporation had the duty of presenting all contententions at once, under the rule against splitting actions, in this case it could not. It had a right to sue on the refusal of its first claim for refund, but only on the grounds presented in that claim. Internal Revenue Code §3772. Not even by amendment could any different ground be added without the consent of the United States. *Stevens vs. United States*, 53 Fed. (2) 1; *Sneed, Collector, vs. Elmore*, 59 Fed. (2) 312; *Real Estate Title Co. vs. United States*, 309 U. S. 13. No such consent existed. The court not only did not but could not consider and decide the issue now tendered. Counsel for the United States, knowing perhaps of the position about to be taken by the Commissioner as to the stockholders, refused any importation of an additional dividends paid credit issue, for the fifth ground of the written motion for judgment, which was sustained, is this: '5. The plaintiff is not entitled to claim dividends paid credit for the taxable year 1937 in excess of $88,500 in this proceeding for the reasons that no such claim was made in the complaint, and there were no such facts alleged in the complaint to support such claim, nor was *any such claim made in the claim for refund.*'

Therefore the United States stands with $3,337 of the taxpayer's money which ought to be refunded, but which will not be because the proper ground was not presented to a court, although the court could not entertain it without the consent of the United States, which consent the United States would not give. The United States is claiming a $30,000 dividend was paid so as to get taxes from the stockholders, and refusing to admit it was paid in order to keep a tax from the corporation assessed because the $30,000 was not so paid. This is so wrong as to look dishonest. None of us judges would suffer ourselves to be put in that

position, and we ought not to put our government there.

Why do we have to? Congress has not said we must. *Cleveland vs. Higgins*, 148 Fed. (2d) 722, follows *Guettel vs. United States*, 95 Fed. (2) 229, and the latter rests on the Court of Claims decision in *Chicago Junction vs. United States*, 10 Fed. Sup. 156. The first case in the Court of Claims on the point was *International Co. vs. United States*, 56 Fed. (2) 708, and in that I think the correct approach was taken. It was thought the second claim for refund would not be barred if it was different from the first which had been adjudged, for the very reason that the second could not have been presented in the former suit. But it was concluded that this saving difference did not exist. In the next case a successful struggle was made to deliver an unpresented credit from the harsh rule of *res judicata*. *Cambridge Loan and Building Co. vs. United States*, 57 Fed. (2) 936. The Supreme Court in *Tait vs. Western Maryland Ry. Co.*, 289 U. S. 620, said that the principles of *res judicata* are to be applied to tax litigation, but the actual application was *estoppel* by judgment against relitigating the very issue which had previously been fully heard. Against that there can be no good objection raised. And I think a judgment by the Tax Court ought to settle the taxes for the year as a whole, for that court has the power and the duty to 'redetermine' the taxes, to entertain each and every debit and credit. Not so the district court, which can only (absent consent) consider the claim which has been presented to the Commissioner and by him rejected or ignored.

In a case like this the basic maxim of *res judicata*, *interest reipublicae ut sit finis litium*, ought not to be applied, but rather *Fiat justitia, ruat coelum*. It is more for the public good that the United States Government in its own courts should deal honorably with its taxpayers than that a few hours of court time should be saved. 'The rule against splitting a cause of action is one made by judges to promote the public policy of the State. It should not be applied to

> frustrate the purpose of its laws or to thwart public policy.' *White vs. Adler, supra.* 'A plaintiff who is not authorized to join the claims cannot later be met with the defense that he split the cause of action.' 1 C.J.S., Actions, page 1310; 1 Am. Jur., Actions, §100. The district judge ought to be sustained in this case." (The italics are the Judge's).

Thus, the decision of the court below on an important point of law, on which "the Supreme Court has not spoken," leaves the law in uncertainty and must needs result in much unnecessary filing of claims by taxpayers and in the inclusion in suits for taxes of countless allegations involving immaterial and unmeritorious claims, which heretofore it has not been necessary to impose upon the courts. The determination of this question will settle this point of law. It will remove the uncertainty which results from and the confusion which is bound to follow in the wake of the Circuit Court's decision. It will resolve the conflict between the circuit courts of appeals on the matter and will make for uniformity of decisions in the lower courts. It will enable the officials of "the United States Government to deal honorably with its taxpayers."

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of Circuit Court of Appeals for the Fifth Circuit should be granted.

Ed. M. Lowrance

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Of Counsel.

March 17, 1947.

APPENDIX.

Certified Copy

Clerk's Office

U. S. Circuit Court of Appeals

Fourth Circuit

Claude M. Dean, Clerk, Richmond

UNITED STATES CIRCUIT COURT OF APPEALS
FOURTH CIRCUIT

No. 5553.

M. HAMPTON MAGRUDER, FORMER UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MARYLAND,
Appellant,

versus

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, EXECUTOR OF THE ESTATE OF THOMAS C. JENKINS, DECEASED,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. CIVIL.

(Argued January 13, 1947.

Decided February 3, 1947.)

Before PARKER, SOPER and DOBIE, Circuit Judges

James P. Garland, Special Assistant to the Attorney General, (Helen R. Carloss, Special Assistant to the Attorney General, and Bernard J. Flynn, United States Attorney, on brief) for Appellant; and Stuart S. Janney, Jr., (Edmund P. Dandridge, Jr., on brief) for Appellee.

DOBIE, Circuit Judge:

Safe Deposit and Trust Company of Baltimore, as executor of the Estate of Thomas Jenkins, deceased, duly filed a federal estate tax return and paid the Collector $1,162,423.64, the amount of the estate tax shown on the return. Subsequently, the executor, upon a deficiency assessment of $835,489.68 by the Collector, paid this amount with interest, under protest, on July 3, 1940, and seasonably filed a claim for a refund. This claim for refund was rejected by the Collector, whereupon the executor instituted an action upon its claim against the Collector in the United States District Court for the District of Maryland.

After extended negotiations, the executor, on November 3, 1941, submitted an offer "to accept in full settlement of said suit fifty per cent of the amount claimed." This offer was accepted by the Government on November 12, 1942, more than a year later; the money was paid to the executor and by stipulation of both parties the action instituted by the executor against the Collector was dis-

missed *with prejudice* May 22, 1943. The executor duly filed a second claim for refund of estate tax based on the contention that a fee of $25,000 paid to Venable, Baetjer & Howard, attorneys for the executor in prosecuting the asserted right to a refund of the money paid under the deficiency assessment, should be deducted from the gross estate. Upon the rejection of this claim, the instant action was instituted and from a judgment in the District Court in favor of the executor, the defendant Collector has duly appealed. The sole question involved in this appeal is the correctness of the ruling by the District Court that the dismissal of the prior action did not constitute, under the doctrine of *res judicata*, a bar to the instant action. And in this connection the Collector vigorously challenges the District Judge's finding: "The amount of the attorneys' fee was not ascertained and could not have been ascertained with any degree of accuracy until after the first suit had been settled and dismissed." The opinion of the District Court is reported in 65 F. Supp. 783.

The doctrine of *res judicata*, well known in our jurisprudence, has figured in numerous decisions involving the precise extent and the exact scope of its application. Usually the doctrine is said to rest on two ancient maxims of the law: (1) a person should not be vexed more than once for the same cause; (2) it is in the public interest that there be an early end to litigation. In a leading work in this field, 2 Freeman on Judgments (Fifth Edition, 1925), §712, at page 1501, it is stated:

> "Where a right or title comes directly in issue the parties are bound to bring forward every matter or ground which might be urged to establish or defeat it and will be estopped by the adjudication from attempting to relitigate the same right or title upon other or different evidence or grounds which might have been urged in the first action. Even a new evi-

dentiary, as distinguished from a new ultimate fact, does not change the situation. But from the rule that an adjudication affects no claims which the parties had no opportunity to litigate, it results that no judgment or decree can prejudice rights which had not accrued to either of the parties at the time of its rendition. A decision that a right exists, or that a wrongful act has been committed, leaves the party at liberty to show at a future time that since the decision was pronounced the right has expired or the wrong has been abated. And the same is true with respect to a decision that no right or cause of action exists; it does not bar a second action when new facts have created a right or cause of action. The fact that the same subject matter was involved in the former action is wholly immaterial.

* * *

"Under no circumstances will a judgment or decree take effect upon rights not then existing." Id. §687, p. 1447.

Id. §669, p. 1479: "It is, of course, obvious that issues outside the jurisdiction of the court to determine, cannot become *res adjudicata* by virtue of its judgment. But even where the matter is not jurisdictional, a judgment is not ordinarily deemed to be an estoppel as to issues which cannot properly be litigated in the proceedings in which it is rendered."

The federal Supreme Court has spoke here in many important cases. See, *State Farm Insurance Co.* v. *Duel*, 324 U. S. 154; *Blair* v. *Commissioner*, 300 U. S. 5; *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20; *Tait* v. *Western Maryland Railway Co.*, 289 U. S. 620; *Cromwell* v. *County of Sac*, 94 U. S. 351. In the *Larsen* case (292 U. S. at page 25) it was said:

"The established rule in this Court is that if, in a second action between the same parties, a claim or demand different from the one sued upon in the prior

> action is presented, then the judgment in the former cause is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the findings or verdict was rendered.' "

The Government seeks a reversal of the instant case, relying heavily (as well it might) on *Cleveland* v. *Higgins*, 148 F. (2d) 722, cert. den. 326 U. S. 722. That decision is admittedly in point and it appears to be the only pronouncement by a federal appellate court on the direct question before us. Judge Coleman declined to follow the *Cleveland* case on the grounds that he disapproved the reasons for the decision and further because the *Cleveland* case relied heavily on *Guettel* v. *United States*, 95 F. (2d) 229, cert. den. 305 U. S. 603, which Judge Coleman distinguished on the score that "the value of the real estate in the *Guettel* case was something which was definitely known at the time of the first suit, and was therefore unlike the attorneys' fees in the present suit, the amount of which was not known." We find ourselves in agreement with the views expressed by Judge Coleman.

The *Cleveland* opinion admits that the fees of the attorneys, such as are here involved, are deductible if properly claimed. Great stress is laid, too, on Treasury Regulation 80, Article 34 which provides: "The executor or administrator, *in filing the return*, may deduct such an amount as attorneys' fees as has been actually paid or which at that time it is reasonably expected will be paid." (Italics ours.) But Article 29 of this same Regulation provides: "An item may be entered *on the return* for deduction though the exact amount thereof is not then known, provided it is ascertainable with reasonable certainty, and will be paid. *No deduction may be taken upon the basis of a vague or uncertain estimate.*" (Italics ours.) Again, Article 99 of this Regulation states: "The *claim*

must set forth in detail and under oath each ground upon which a refund is claimed, and *facts* sufficient to apprise the Commissioner of the *exact basis* thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund." (Italics ours.) It may be noted that Articles 29 and 34 refer specifically in terms to the return.

Under the practice of Maryland an executor is not ordinarily represented by an attorney in the probate courts, and no allowance will be made out of an estate for attorneys' fees unless extraordinary circumstances require the employment of an attorney. If an attorney is employed for routine matters, the executor must pay the fee out of his commissions. In the present case the executor had not employed any attorney when it filed the original return on May 25, 1939, nor was there any reason at that time for it to anticipate that any attorneys' fees would be incurred in the settlement of the estate for which a deduction could be claimed under the regulation. Only after the deficiency assessment did the executor employ attorneys. And the fees of attorneys paid by an executor are allowed out of the estate, in Maryland, only upon the approval of these fees by the Orphans' Court. Certainly any attempt to estimate the amount of attorneys' fees at the time of the executor's return, since not even the employment by the executor of an attorney was then contemplated, must obviously have been "vague and uncertain."

Equally true is it that the amount of the fees of the attorneys could not have been determined with any degree of certainty when the suit for refund was filed. No one could then tell the outcome or how protracted might be the litigation. We must, therefore, agree with Judge Coleman's finding that these fees "could not have been ascertained with any degree of accuracy until after the first suit had been settled and determined."

We are not impressed by the suggestion in the *Cleveland* case of the possibility of a long series of suits, each seeking a deduction for the attorneys' fees in the preceding suit. For all practical purposes, the negligible amounts that could thus be realized and the statute of limitations would negative any very extensive use of such proceedings.[1]

Nor can we accept as controlling here the contention (strongly stressed by the Government) that the federal estate tax is a unitary claim, a single cause of action which cannot be split. Tax statutes are intensely realistic. They must be construed and administered in the light of practical experience rather than in the spirit of analytical conceptualism. And it is freely admitted that any number of separate claims for refund, arising out of supervening facts, may properly be made, provided only these are filed within the period specified in the applicable statute of limitations.

Obviously, the deductibility of the attorneys' fees was not an issue in the first suit for refund. As found by Judge Coleman:

> "The only three issues involved were:
>
> (1) whether the value of certain property transferred by the decedent in his lifetime should be included in his estate as property transferred in contemplation of death;
>
> (2) whether the value of the property of certain trusts passing under powers of appointment exercised by the will of the decedent should be included in his gross estate as property passing under general powers of appointment exercised by the decedent; and
>
> (3) the valuation of certain assets of the estate."

[1]See 59 Harv. L. Rev. note, 1322, 1323.

And, in the Commissioner's Certificate of Overassessment, it is expressly stated:

> "This certificate of overassessment is issued pursuant to the directions contained in letter from the Department of Justice dated November 12, 1942. Under such directions payment of the sum mentioned herein is made in full settlement of all issues involved in the case of *Safe Deposit and Trust Company of Baltimore, Executor of the Estate of Thomas C. Jenkins* v. *Magruder,* now pending in the United States District Court for the District of Maryland, and dismissal of said action with prejudice is to be entered."

At the time of the first suit for refund the law to be derived from the cases seemed to indicate that attorneys' fees such as those here involved could not be estimated in advance and deducted, for such claims had been held to be "vague and uncertain." *Proctor* v. *Hassett,* (D. Mass. 1943) 52 F. Supp. 12; *First National Bank of Birmingham* v. *United States* (N. D. Ala. 1939) 25 F. Supp. 815. And, in the *Cleveland* case, Judge Leibell in the District Court had denied the Collector's motion to dismiss, 50 F. Supp. 188. The case was tried by another judge who entered a judgment for plaintiff. The decision of the Circuit Court of Appeals in the *Cleveland* case was handed down after the filing of the first suit for refund in the instant case. And it seems that the Commissioner of Internal Revenue had in practice originally taken the position upheld in these earlier cases. See (both recently decided by our Court) *Maddrix* v. *Dize,* 153 F. (2d) 274; *Commissioner* v. *Arundel Brooks Concrete Corporation,* 152 F. (2d) 225. And, see also, *Hard* v. *Albert,* 214 Cal. 15, 3 Pac. (2d) 545.

Hindsight is, of course, much clearer than foresight. It is, therefore, easy now to suggest that the executor's attorneys here should have expressly raised the question of the deductibility of the attorneys' fees before settlement

of the suit for refund. Under the then existing facts and the then seeming state of the law, it might well be asked whether the obligation to raise this question at that time did not rest rather on the Government. As a fact, the question was not then raised or even suggested by either party.

Every good doctrine or principle of law has sometimes been unduly stretched to encompass injustice. *Res judicata* is no exception. The propriety of the deduction here claimed is admitted; there was certainly grave doubt as to just how the claim could be asserted. We think, under all the circumstances of the instant case, that equity, good conscience and fair play justify Judge Coleman's view that *res judicata* should not serve as a bar to the present action which seeks a deduction of the attorneys' fees here (for the purpose of the federal estate tax) from the gross estate.

The judgment of the District Court is affirmed.

Affirmed.

A true copy,
Teste:

Claude M. Dean,
(Seal) Clerk, U. S. Circuit Court of Appeals
4th Circuit.
By R. M. F. Williams, Jr.,
Deputy Clerk.